

1 Mark R. Thierman NV#8285
2 **THIERMAN LAW FIRM, PC**
3 7287 Lakeside Drive
4 Reno, Nevada 89511
5 Tel: (775) 284-1500
6 Fax: (775) 703-5027
7 E-mail: laborlawyer@pacbell.net

8 Matthew J. Piers
9 mpiers@hsplegal.com
10 José Jorge Behar
11 jbehar@hsplegal.com
12 Christopher J. Wilmes
13 cwilmes@hsplegal.com
14 Caryn C. Lederer
15 clederer@hsplegal.com

16 **HUGHES SOCOL PIERS RESNICK & DYM, LTD.**
17 70 W. Madison Street, Suite 4000
18 Chicago, IL 60602
19 Tel: (312) 580-0100
20 Fax: (312) 580-1994

21 *Attorneys for Plaintiff*

22 UNITED STATES DISTRICT COURT

23 DISTRICT OF NEVADA

24 VÍCTOR RIVERA RIVERA, ERNESTO)
25 SEBASTIAN CASTILLO RÍOS, VICENTE)
26 CORNEJO LUGO, JESÚS GARCÍA MATA,)
27 LUIS ÁNGEL GARCÍA MATA,)
28 GAUDENCIO GARCÍA RÍOS, SIMÓN)
GARCÍA RÍOS, VICENTE CORNEJO CRUZ,)
EMILIO MONTOYA MORALES, JORGE)
LUIS AGUILAR SOLANO, DOMINGO)
RAMOS RÍOS, ARTEMIO RINCÓN CRUZ,)
SERGIO RÍOS RAMOS, PEDRO RIVERA)
CAMACHO, GERARDO RÍOS RAMOS,)
REGULO RINCON CRUZ, AURELIANO)
MONTES MONTES, MANUEL RIVERA)
RIVERA, JOSE BALDERAS GUERRERO,)
VIRGILIO MARQUEZ LARA, MARTIN)
FLORES BRAVO, individually and on behalf)
of all other persons similarly situated,)

Plaintiffs,

vs.

PERI & SONS FARMS, INC.,

CASE NO. 3:11-CV-118-RCJ-VPC

**PLAINTIFFS' MOTION FOR LEAVE
TO FILE SECOND AMENDED
COMPLAINT**

1 Defendant. }

2 Plaintiffs move the Court, pursuant to Rule 15 of the Federal Rules of Civil
3 Procedure, for leave to file a Second Amended Class Action Complaint. The attached
4 Memorandum of Points and Authorities supports this Motion.
5

6 Dated: May 16, 2011

Respectfully Submitted,

7 /s/ José J. Behar

8 Mark R. Thierman, NV#8285
9 THIERMAN LAW FIRM, PC
7287 Lakeside Drive
10 Reno, Nevada 89511
Tel: (775) 284-1500
11 Fax: (775) 703-5027
E-mail: laborlawyer@pacbell.net

12 Matthew J. Piers
13 mpiers@hsplegal.com
14 José Jorge Behar
jbehar@hsplegal.com
15 Christopher J. Wilmes
cwilmes@hsplegal.com
16 Caryn C. Lederer
clederer@hsplegal.com
17 HUGHES SOCOL PIERS RESNICK &
18 DYM, LTD.
70 W. Madison Street, Suite 4000
19 Chicago, IL 60602
Tel: (312) 580-0100
20 Fax: (312) 580-1994

21 **IT IS SO ORDERED:**
22 **UNITED STATES DISTRICT JUDGE,**

23 **DATED:** _____
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES**BACKGROUND**

On February 16, 2011, Plaintiffs filed this class and collective action against Peri & Sons Farms, Inc. ("Peri & Sons" or "Defendant"). Plaintiffs, Mexican agricultural workers who were employed by Defendant through the H-2A guest worker program, allege that Defendant: (1) failed to pay them minimum wages mandated by the Fair Labor Standards Act ("FLSA"), the Nevada Wage and Hour Laws, and the Nevada Constitution, and (2) breached multiple employment contracts by failing to pay them contractually-guaranteed wages and other employment-related expenses.

On March 7, 2011, Plaintiffs filed an Amended Class Action Complaint to add three members of the proposed class as named Plaintiffs.

On April 13, 2011, Defendants filed a Motion to Dismiss which, despite Plaintiffs' allegations that Defendant failed to pay Plaintiffs the wages they were guaranteed by law and contract, *see* Plaintiffs' Amended Class Action Complaint ("Pls. Am. Compl.") ¶¶ 2, 19, 21, 28, 42, mischaracterized Plaintiffs' claims as relating only to Defendant's failure to pay "certain personal travel and immigration expenses." *See, e.g.* Defendant's Motion ("Def. Mot.") at 3, 6. In their motion, Defendants argue that: (1) Plaintiffs' FLSA and Nevada minimum wage claims do not constitute a valid cause of action; (2) Plaintiffs' claims are untimely; (3) Plaintiffs do not have valid breach of contract claims; and (4) the Court should not exercise supplemental jurisdiction over Plaintiffs' state law claims.

Plaintiffs have responded fully to these meritless arguments in their Memorandum in Opposition to Defendants' Motion to Dismiss, and the Court should deny the Defendant's Motion for the reasons outlined in that Memorandum. Nevertheless, Plaintiffs also seek

1 leave to file a Second Amended Class Action Complaint, attached as Exhibit A, in order to
2 further address Defendant's third and fourth arguments regarding whether Plaintiffs have
3 sufficiently alleged a breach of contract claim and whether the Court should maintain
4 jurisdiction over Plaintiffs' state law claims, and to establish the Court's jurisdiction under
5 the Class Action Fairness Act. Attached as Exhibit B is a marked copy of Plaintiffs' Second
6 Amended Class Action Complaint that shows the proposed amendments.
7

8 Specifically, Plaintiffs' proposed Second Amended Class Action Complaint
9 supplements the factual allegations underlying their breach of contract claim to clarify the
10 full scope of Defendant's systemic practice of paying Plaintiffs and other Class Members at
11 rates far below the adverse effect wage rate. Additionally, in order to avoid needless debate
12 over jurisdictional issues, Plaintiffs seek to establish the Court's jurisdiction of this matter
13 under the Class Action Fairness Act, 28 U.S.C. § 1332(d), by pleading with more specificity
14 the scope of the class and the amount in controversy since Plaintiffs' investigation to date has
15 revealed that the class members will number over one hundred and the amount of their
16 claims exceed five million dollars. Plaintiffs also seek leave to add proposed class members
17 Ernesto Aguilar Bocanegra, Salvador Isidro Ramirez, and Jose Juan Garcia Mata, as named
18 Plaintiffs.
19
20

21 ARGUMENT

22 Leave to amend should be "freely given when justice so requires." Fed. R. Civ. P.
23 15(a). This policy "is to be applied with extreme liberality" and courts should grant leave
24 unless the opposing party can show undue delay, bad faith or dilatory motive, repeated
25 failure to cure deficiencies by amendments previously allowed, futility of amendment, or
26 undue prejudice. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.
27
28

1 2003) (*quoting Foman v. Davis*, 371 U.S. 178, 182 (1962)). “Absent prejudice or a strong
2 showing of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in
3 favor of granting leave to amend.” *Id.* Each of these factors favor granting leave to amend
4 here.

5 Plaintiffs’ Motion is timely and submitted in good faith. This Motion is Plaintiffs’
6 first request for leave to amend and would be their first amendment to the substantive
7 allegations made in the complaint. Plaintiffs’ previous amendment solely served to add three
8 proposed class members as named Plaintiffs.

9
10 The amendment would not be futile – it directly addresses arguments raised by
11 Defendants in their Motion to Dismiss. Pleading with greater specificity would more clearly
12 present Plaintiffs’ breach of contract claims and provide the Court with a better
13 understanding of the grounds of Plaintiffs’ entitlement to relief. Defendant has
14 fundamentally misconstrued the nature of these claims and Plaintiffs wish to make clear that
15 Defendant’s contract breaches extend far beyond the failure to pay transportation expenses.
16 Factual allegations regarding Defendant’s extensive wage payment abuses, including paying
17 Plaintiffs and other class members at hourly rates several dollars below the adverse effect
18 wage rate, manipulating the piece rate payment system, and failing entirely to pay workers
19 for their labor incontrovertibly would establish that Plaintiffs have valid breach of contract
20 claims.
21

22
23 Similarly, additional allegations that make clear that the amount in controversy in this
24 action exceeds five million dollars would confirm the Court’s original jurisdiction under the
25 Class Action Fairness Act. *See* 28 U.S.C. § 1332(d) (“the district courts shall have original
26 jurisdiction of any civil action in which the matter in controversy exceeds the sum of value of
27
28

1 \$ 5,000,000,” where the aggregate number of proposed class members is greater than 100,
2 and minimal diversity exists). Plaintiffs recently received responses to a Freedom of
3 Information Act request to the Department of Labor; the agency’s records provided detailed
4 information regarding the number of workers in the proposed class and the terms of
5 Plaintiffs’ and other class members’ employment contracts. This information allows
6 Plaintiffs to allege with certainty that, based on the number of workers in the proposed class
7 and the potential damages owed to each, more than five million dollars is in controversy in
8 this case. An amendment would affirmatively establish the Court’s jurisdiction over
9 Plaintiffs’ state law claims and prevent unnecessary evaluation of supplemental jurisdiction
10 issues.
11

12
13 Granting leave to amend to add proposed class members Ernesto Aguilar Bocanegra,
14 Salvador Isidro Ramirez, and Jose Juan Garcia Mata as named Plaintiffs in the case would
15 allow these workers to present their claims directly to the Court. It also would help develop
16 facts relevant to the class throughout these proceedings.
17

18 Finally, Defendant will not be prejudiced if the Court grants leave to amend.
19 Defendant has not yet answered Plaintiffs’ Amended Complaint, and the Court has not set a
20 discovery schedule. At this early stage of the proceedings, an amendment will not prejudice
21 Defendant in any way.
22

23 CONCLUSION

24 For the foregoing reasons, Plaintiffs seek leave to file a Second Amended Complaint,
25 a copy of which is attached hereto as Exhibit A.

26 Dated: May 16, 2011

Respectfully Submitted,

27 /s/ José J. Behar
28

1 Mark R. Thierman, NV#8285
2 **THIERMAN LAW FIRM, PC**
3 7287 Lakeside Drive
4 Reno, Nevada 89511
5 Tel: (775) 284-1500
6 Fax: (775) 703-5027
7 E-mail: laborlawyer@pacbell.net

8 Matthew J. Piers
9 mpiers@hsplegal.com
10 José Jorge Behar
11 jbehar@hsplegal.com
12 Christopher J. Wilmes
13 cwilmes@hsplegal.com
14 Caryn C. Lederer
15 clederer@hsplegal.com
16 **HUGHES SOCOL PIERS RESNICK &**
17 **DYM, LTD.**
18 70 W. Madison Street, Suite 4000
19 Chicago, IL 60602
20 Tel: (312) 580-0100
21 Fax: (312) 580-1994

22 *Attorneys for Plaintiff*
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2011, I electronically filed the attached document with the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

Jeremy J. Nork, Esq.,
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89169
Phone: (775) 327-3000
Fax: (775) 786-6179
jnork@hollandhart.com

Gregory A. Eurich
Joseph Neguse
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, Colorado 80202
Phone: (303) 295-8000
Fax: (303) 295-8261
geurich@hollandhart.com
jneguse@hollandhart.com

/s/ José J. Behar